95-1103

No. _____

Supreme Court, U.S.
FILED
JAN 2 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM 1995

SETH WAPNICK and JON WAPNICK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court below err by not applying this Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991), and not vacating petitioners' conspiracy conviction, when one of the objects of the charged conspiracy had been invalidated on *legal*, as opposed to *factual*, grounds?

2. Did petitioners' conduct, in which they cashed checks at a bank and then transferred the cash to third parties, require the filing of a Currency Transaction Report, and thereby violate 31 U.S.C. §5313(a)?

LIST OF PARTIES

In addition to the parties set forth in the caption, there were two additional defendants in the criminal prosecution in the United States District Court for the Eastern District of New York, and in the appeal to the United States Court of Appeals for the Second Circuit: Harold Wapnick and Steven Wolfson.

TABLE OF CONTENTS

QUESTIONS PRESENTED I

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 2

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

Introduction 3

Statement of the Facts 5

The Decisions Below 7

REASONS FOR GRANTING THE WRIT 8

I. The Decision Below Must Be Reversed Because It Permits Wholesale Evasion of the Clear Rule Established By This Court In *Griffin v. United States* 8

II. The Court Should Decide Whether Petitioners' Conduct Required the Filing of Currency Transaction Reports Pursuant to 31 U.S.C. §5313(a). 17

CONCLUSION. 24

APPENDIX

APPENDIX A. 1a

APPENDIX B. 1b

TABLE OF AUTHORITIES

CASES

California Bankers Association v. Shultz,
416 U.S. 21 (1974). 18

Griffin v. United States, 502 U.S. 46 (1991). 3,4,8,9,
10,11,14,
15,16,17,
24

Ratzlaf v. United States, ___ U.S. ___,
114 S. Ct. 655 (1994). 3,4,6,7,
8,9,18

Stromberg v. California, 283 U.S. 359 (1931). 9, 16

United States v. Briscoe, 65 F.3d 576 (7th Cir. 1995) . . . 16

United States v. Goldberg, 756 F.2d 949 (2d Cir.),
cert. denied, 472 U.S. 1009 (1985). 21, 22

United States v. Gollott, 939 F.2d 255 (5th Cir. 1991) . . 20

United States v. Harris, 27 F.3d 111 (4th Cir. 1994). . . . 10

United States v. Hawley, 855 F.2d 595 (8th Cir.
1988), *cert. denied*, 489 U.S. 1020 (1989). . . . 21,22

United States v. Hernando Ospina, 798 F.2d 1570
(11th Cir. 1986). 21

United States v. Jackson, 33 F.3d 866 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1316 (1995). 7, 14, 15, 16

United States v. Nersesian, 824 F.2d 1294 (2d Cir.), *cert. denied*, 484 U.S. 958 (1987). . . 21

United States v. Nieves-Burgos, 62 F.3d 431 (1st Cir. 1995). 8

United States v. Scanio, 900 F.2d 485 (2d Cir. 1990). . 19

United States v. Tannenbaum, 934 F.2d 8 (2d Cir. 1991). 21

United States v. Torres Lebron, 704 F. Supp. 332 (D.P.R. 1989). 22

United States v. Tota, 672 F. Supp. 716 (S.D.N.Y. 1987). 18

United States v. Wapnick, 60 F.3d 948 (2d Cir. 1995). 2, 7, 11,14

Yates v. United States, 354 U.S. 298 (1957). 9,16

STATUTES

18 U.S.C. §371. . . . . 2,3,4,5, 7,8,9,10, 14

26 U.S.C. §6050(I). 19,20

26 U.S.C. §7206(1) 5

28 U.S.C. §1254(1) 2

31 C.F.R. §103.11(a)(1) 20

31 C.F.R. §103.11(f) 19

31 C.F.R. §103.11(i)(1) 22

31 C.F.R. §103.11(i)(3) 20

31 C.F.R. §103.11(b)(2) 22

31 U.S.C. §5313(a) 2,3,4, 5,7,18, 21, 22, 23, 24

31 U.S.C. §5324 5,11

No. _____

IN THE

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OCTOBER TERM 1995

SETH WAPNICK and JON WAPNICK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Seth Wapnick and Jon Wapnick respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Second Circuit entered July 10, 1995, and October 3, 1995.

OPINIONS BELOW

The July 10, 1995, opinion of the Court of Appeals (Appendix A, *infra*, at 1a-19a) is reported at 60 F.3d 948 (2d Cir. 1995). The Court of Appeals' October 3, 1995, Order denying petitioners' petition for rehearing (Appendix B, *infra*, at 1b) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered July 10, 1995. A timely petition for rehearing was denied October 3, 1995, and this petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §371 states in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

31 U.S.C. §5313(a) states:

> When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the

> Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. A participant acting for another person shall make the report as the agent or bailee of the person and identify the person for whom the transaction is being made.

STATEMENT OF THE CASE

Introduction

This case involves a set of circumstances controlled by this Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991): one object -- the "structuring" of cash withdrawals in order to avoid the filing of Currency Transaction Reports -- of a multi-object conspiracy was invalid on *legal*, as opposed to factual, grounds as a result of an instruction to the jury that did not require a finding of "wilfulness" [contrary to this Court's subsequent decision in *Ratzlaf v. United States*, ___ U.S. ___, 114 S. Ct. 655 (1994)].

Under *Griffin*, petitioners' conspiracy conviction must be vacated. Yet the Court of Appeals affirmed the conspiracy conviction without even addressing *Griffin* and the line of cases upon which it relied. Instead, the Court of Appeals stated simply that since a prosecution under 18 U.S.C. §371's "conspiracy to defraud the United States" clause does not *require* the commission of an offense against the United States, vacatur of substantive "structuring" counts under

Ratzlaf would not mandate vacatur of the §371 conspiracy count as well.

That analysis, however, ignores the fact that *Griffin* was itself a prosecution under the "defraud" clause of §371, and that regardless of the disposition of the substantive counts, "structuring" was unquestionably an alternative object of the multi-object conspiracy alleged in the Indictment. Therefore, this Court should grant certiorari in order to prevent "end runs" around the clear dictates of *Griffin* with respect to multi-object conspiracies, whether they are styled as conspiracies to "defraud the United States" or to "commit an offense against the United States."

In addition, petitioners were also convicted of failing to file Currency Transaction Reports ("CTR's") for cash transactions in excess of $10,000, in violation of 31 U.S.C. §5313(a). However, petitioners' conduct did not constitute a violation of §5313(a), or the regulations promulgated thereunder. As detailed below, petitioners were not required to file CTR's because the only part of the transaction that involved "check cashing" -- an event precipitating the CTR filing requirements -- was performed at a bank that filed the appropriate CTR's. Petitioners' subsequent transfer of the cash generated at the bank to third parties did not require a CTR, yet that is the act, and the attendant failure to file CTR's therefor, for which they were convicted under §5313(a). It is respectfully submitted that this Court should grant certiorari to decide whether petitioners' conduct required the filing of CTR's under §5313(a), and to preclude this improper expansion of the reach of a federal criminal statute.

Statement of the Facts

Petitioners Seth and Jon Wapnick (hereinafter "Seth" and "Jon"), along with their father Harold Wapnick and Steven Wolfson, were convicted after a ten-week trial of a 152-count Indictment. Petitioners were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. §371, with respect to (a) their preparation of tax returns for taxi drivers; (b) their own tax returns; (c) their failure to file Currency Transaction Reports ("CTR's") for transactions involving more than $10,000 in currency; and (d) their "structuring" of transactions to avoid the CTR reporting requirement.

Petitioners were also convicted of substantive violations of (a) 26 U.S.C. §7206(1), aiding and abetting the filing of false tax returns (of the taxi drivers); (b) failing to file CTR's in violation of 31 U.S.C. §5313(a); and (c) "structuring" in violation of 31 U.S.C. §5324. In addition, Seth was convicted of filing false personal income tax returns in violation of 26 U.S.C. §7206(1). Jon was acquitted of the personal income tax charges against him, and he and Seth also were acquitted of some of the counts charging the substantive offenses listed above.

All of the allegations revolved around the accounting business controlled by Harold Wapnick, in which Seth and Jon were employed. The conspiracy and the substantive offenses charged encompassed four categories of illegal conduct: (1) that defendants, as tax preparers, assisted taxi drivers in preparing false tax returns; (2) that defendants Harold Wapnick, Seth Wapnick, and Jon Wapnick filed false personal income tax returns; (3) that defendants Harold, Seth, and Jon Wapnick knowingly and willfully failed to file Currency Transaction Reports on transactions involving in

excess of $10,000; and (4) that defendants Harold, Seth, and Jon Wapnick "structured" transactions in an attempt to evade currency reporting requirements.

Regarding the CTR and "structuring" part of the case, the testimony at trial established the followin:

Harold Wapnick maintained 13 corporate bank accounts at Republic National Bank. Among other purposes, Harold Wapnick utilized these accounts to provide cash, for a fee, to third-party businessmen.

The cash was provided as follows: a third-party businessman would bring to Harold Wapnick a check payable to (or, in limited instances, from) the third-party businessman's business. That check would be deposited in one of the thirteen corporate accounts. Subsequently, $9,500 checks would be written against any of the thirteen accounts, and cashed at Republic Bank. The cash generated by the bank would then be delivered, less Harold Wapnick's fee, to the third-party businessman.

Bank personnel established that at a certain point the bank began filing CTR's for the cashing of the $9,500 checks, and that Harold Wapnick was so informed. Nevertheless, the transactions did not change at all in character after such notification. Harold Wapnick testified that he was aware from the outset that the bank was filing CTR's, and that because the bank was filing CTR's for the transactions, he believed he was not required to do so.

After petitioners were convicted, but prior to sentencing, this Court decided *Ratzlaf v. United States*, ___ U.S. ___, 114 S. Ct. 655 (1994), which invalidated the "structuring" convictions because the jury was not required to

find proof of an essential element, namely the petitioners' "willfulness". As a result, the "structuring" convictions were vacated by the District Court. Petitioners also moved to vacate their other convictions based on the impact of *Ratzlaf*, *i.e.*, the multi-object conspiracy could not stand because one of its objects was held invalid as a matter of law, but the District Court denied them relief.

Petitioners were each sentenced to 33 months' imprisonment, a $10,000 fine, and three years' supervised release.

The Decisions Below

The Court of Appeals rejected petitioners' argument, *inter alia*, that *Ratzlaf* invalidated not only the "structuring" charges, but also their conspiracy conviction, because once the "structuring" objective was deemed legally insufficient, the governing rule is that it is "impossible to tell" whether the jury relied on the invalid conspiratorial object in reaching its verdict of guilty. *See* Appendix A at 10a-12a (60 F.3d at 952-53).

The Court of Appeals, however, held that "structuring" was not an objective of the conspiracy, since, according to the Court of Appeals, "the substantive crime of structuring under §371 was not a necessary predicate of the conspiracy charge." Appendix A at 11a (60 F.3d at 953). In reaching its conclusion, the Court of Appeals relied in large part on *United States v. Jackson*, 33 F.3d 866 (7th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1316 (1995). *Id.*

The Court of Appeals did not address petitioners' claim that their conduct did not constitute a violation of the CTR requirements of 31 U.S.C. §5313(a) and the regulations

promulgated thereunder.

Rehearing was denied October 3, 1995. *See* Appendix B at 1b.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW MUST BE REVERSED BECAUSE IT PERMITS WHOLESALE EVASION OF THE CLEAR RULE ESTABLISHED BY THIS COURT IN *GRIFFIN V. UNITED STATES*

In *Griffin v. United States*, 502 U.S. 46 (1991), this Court clarified an important issue in criminal law by distinguishing between two situations: those in which a single object of a multi-object conspiracy is found insufficient as a matter of *law*, and those in which the insufficiency is as a matter of *fact*. In the former, the conspiracy conviction must be vacated; in the latter, the conspiracy conviction is valid. 502 U.S. at 52-59. *See also United States v. Nieves-Burgos*, 62 F.3d 431, 434-35 (1st Cir. 1995).

The decision below seriously undermines *Griffin*, permitting evasion of that rule in cases involving the "conspiracy to defraud the United States" prong of 18 U.S.C. §371, even though *Griffin* itself involved the "conspiracy to defraud" clause. Accordingly, it is respectfully submitted that certiorari should be granted to vindicate the important rule and distinction set forth in *Griffin*.

Petitioners' principal claim on appeal was the impact of this Court's decision in *Ratzlaf v. United States*, ___ U.S.

___, 114 S. Ct. 655 (1994), which invalidated their "structuring" convictions. Since "structuring" was an object of the conspiracy charged against them, petitioners asserted that, under settled doctrine established by *Griffin* and its predecessors, including *Yates v. United States*, 354 U.S. 298, 311-12 (1957) and *Stromberg v. California*, 283 U.S. 359, 367-68 (1931), the conspiracy could not survive after one of its objectives had been voided on *legal* (as opposed to factual) grounds.[1]

In affirming petitioners' conspiracy conviction, the Court of Appeals adopted an argument that the government raised for the first time on appeal: that, since the conspiracy to defraud the United States charged in Count One (under 18 U.S.C. §371) alleged as objectives the impairment of the Internal Revenue Service's functions with respect to (a) ascertaining, computing, assessing and collecting revenue, namely income taxes; and (b) collecting information regarding transactions in United States currency in excess of $10,000, "the substantive crime of structuring under §371 was not a necessary predicate of the conspiracy charge[,]" and, consequently, the conspiracy conviction was not voided by this Court's subsequent decision in *Ratzlaf*, which had invalidated petitioners' structuring convictions. Appendix A at 11a (60 F.3d at 953).

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[1] In *Yates*, *supra*, this Court declared that "the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." 354 U.S. at 311-12. *Griffin* explained that the above-described rule applies only when the infirmity is *legal* rather than *evidentiary* in nature. 502 U.S. at 52-59.

In so doing, the Court of Appeals, without distinguishing, or even *mentioning* this Court's defining decision in *Griffin*, effectively eviscerated it in the context of conspiracy prosecutions instituted under §371's "conspiracy to defraud the United States" prong, even though *Griffin* itself was a prosecution under that very clause. 502 U.S. at 47, 55-58.

The Court of Appeals' decision creates a distinction that does not exist, since the objective of a multi-object conspiracy to defraud the United States certainly is not mutually exclusive of, and indeed often incorporates, the substantive offenses charged elsewhere in the same indictment. Thus, the mere fact that a §371 "conspiracy to defraud" charge does not *require* the enumeration or commission of a substantive offense, that does not at all mean that the substantive offenses in the indictment do not also reflect the objectives of the "conspiracy to defraud".

Moreover, *Griffin*'s rule that general verdicts that may have been based on legally invalid grounds cannot stand has been applied not just strictly to the "objects" of a conspiracy, but also to the essential evidentiary underpinnings. In *United States v. Harris*, 27 F.3d 111, 133-14 (4th Cir. 1994), the Fourth Circuit held that the possibility that the jury based its verdict (on one of the conspiracy's objects) on unconstitutionally obtained and introduced evidence invalidated the conspiracy conviction.

Surely, as the record set forth below demonstrates, here the objectives of the conspiracy corresponded directly to the substantive offenses charged in the Indictment, including the "structuring" charges that were subsequently invalidated due to the legal deficiency in the jury instructions. In failing to recognize that fact, the Court of Appeals' decision below

circumvents this Court's dictates in *Griffin*, and threatens to provide a convenient means for evading *Griffin*'s clear rule in the context of "conspiracy to defraud" cases in which the invalidation of substantive offenses, on legal grounds, requires vacatur of the conspiracy conviction.

Indeed, here, "structuring" was designated by the Indictment, by the government in its presentation and arguments to the jury, and by the District Court in its charge to the jury, as an objective of the conspiracy, and not just, as the Court of Appeals mistakenly characterized it, a "means to an end." Appendix A at 12a (60 F.3d at 953).

Plainly, the "structuring"offenses comprised a basis for the jury to find the existence of the charged conspiracy's second alleged illegal objective: impairment of the Internal Revenue Service's functions with respect to collecting information regarding transactions in United States currency in excess of $10,000.

For example, at ¶ 10, the Indictment defined "structuring", which describes the criminal offense proscribed in 31 U.S.C. §5324 (which was charged and further described later as "structuring" in the counts alleging that as a substantive offense). Also, at ¶ 23, as part of the conspiracy count, the Indictment charged that

> [i]t was further part of this conspiracy that the defendants HAROLD WAPNICK, SETH WAPNICK and JON WAPNICK, for the purpose of evading the CTR reporting requirements of Title 31, Code of Federal Regulations, would then "structure" currency transactions at the Republic Bank by writing multiple checks to "cash" in amounts under

> $10,000, and then withdraw the cash from "nominee" bank accounts.

In its presentation to the jury, the government reinforced the importance of the "structuring" allegations to the conspiracy's second alleged objective. For example, in its summation, the government argued

> the evidence and facts and circumstances of this case only prove the real importance of filing CTRs with the IRS and *how structuring to avoid these filing requirements can impair and impede the IRS in discovering financial information and assuring compliance with the revenue laws.*

Tr. 10,158 (6/17/93) (emphasis added).[2]

That, simply, represents a restatement of the second alleged objective of the charged conspiracy, with "structuring" identified as the critical element. Thus, the government certainly treated "structuring" as an objective of the conspiracy, both in the Indictment and its arguments to the jury. Indeed, the government would have undoubtedly argued the converse of petitioners' claim: if the "structuring" were all that survived (and not the tax preparation and CTR-based prongs of the conspiracy), the government would unquestionably assert that the "structuring" alone was sufficient to sustain the second alleged illegal objective of the conspiracy.

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[2] "Tr." refers to the transcript of petitioners' trial in the District Court. The parentheses indicate the date of the particular trial proceedings.

Moreover, the District Court's instructions to the jury further confirmed that the "structuring" allegations, as well as the other substantive offenses charged, were interchangeable with the conspiracy's alleged objectives. After reading essentially the entirety of the conspiracy count from the Indictment, the District Court next listed the "substantive crimes" in the Indictment, including "structuring of currency transactions", *id.*, and instructed the jury that

> [y]ou may find the defendants guilty of the crime of conspiracy to defraud the United States even though the *substantive crimes which were the objects of the conspiracy were not actually committed.*

Tr. 10,531 (6/21/93) (emphasis added).[3]

Thus, the jury charge, as well as the government, viewed the substantive offenses as substitutes for the "objects" of the charged conspiracy. In fact, that is precisely the way the government presented the issue to the jury at

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[3] Explaining further, the District Court advised the jury that

> [i]f . . . you find beyond a reasonable doubt that the minds of at least two of the alleged conspirators met in an understanding and that they agreed . . . to work together in furtherance of the unlawful schemes alleged in the indictment, then proof of the existence of the conspiracy is complete.

Tr. 10,534 (6/21/93).

trial. For instance, in its opening statement, the government stated,

> [t]his scheme to defraud and to fool the IRS had a number of parts to it and various parts are reflected in the substantive counts of the indictment which follow the conspiracy count that you heard about.

Tr. 59 (3/30/93).

Consequently, regardless whether a §371 conspiracy *requires* the commission of a substantive offense (or the attempt to do so), *in this case* the Indictment charged, the government prosecuted, and the District Court charged the jury that the objects of the conspiracy were synonymous with the substantive offenses that directly paralleled those conspiratorial objectives.

Notwithstanding the clear record, and the clear result dictated by this Court's decision in *Griffin*, the decision below ignored *Griffin*, and instead relied on the Seventh Circuit's decision in *United States v. Jackson*, *supra*, as well as on its own conclusion that its "reading of the record [did] not persuade [the Court of Appeals] that the district court and the government effectively amended the indictment by permitting the jury to find structuring to be an end, rather than a means to an end, of the conspiracy." Appendix A at 12a (60 F.3d at 953).

However, *Jackson* did not, as the Court of Appeals contended in its opinion below, present a "virtually identical argument" to that raised here. Appendix A at 11a (60 F.3d at 953).. In *Jackson*, the Seventh Circuit merely reiterated that §371 "does not *require* that the government prove a violation

of a separate substantive statute[,]" 33 F.3d at 870 (citations omitted) (emphasis in original), and noted that in *Jackson* neither the indictment nor the government identified the substantive violation as an objective of the conspiracy..

Indeed, the defendant in *Jackson* did not even raise the issue raised here: that the jury *could have* relied on the invalidated structuring charges. Instead, the defendant argued that the conspiracy conviction "*necessarily* was predicated on violations of the antistructuring laws." 33 F.3d at 869 (emphasis added). In *Jackson*, since the language in the Indictment (or, presumably, the government's theory and argument, and the District Court's charge) did not refer to "structuring", or to Title 31 violations, the defendant's claim could not prevail. 33 F.3d at 869.

Thus, in contrast to this case, in *Jackson* the Seventh Circuit did not sustain a conspiracy in which the Indictment, the government's theory, and the charge to the jury all incorporated the substantive offense allegations into the objectives of the conspiracy to defraud. Indeed, for that reason *Jackson* does not even discuss the long line of cases that culminated in this Court's decision in *Griffin*, which directs that a conviction for a multi-object conspiracy must be vacated when the substantive offenses underlying one of the illegal objects are subsequently found legally deficient. 502 U.S. at 52-59.

Nevertheless, in its decision below here, the Court of Appeals repeated *Jackson*'s omission of *Griffin*, but did so under circumstances that were not only very different from those in *Jackson*, but also that were controlled by the

inescapable rule explained in *Griffin*.[4]

The decision below, by skirting the principle underlying *Griffin*, *Yates*, and *Stromberg*, was also able to ignore another crucial aspect of those three cases: that a conspiracy conviction is *presumed* invalid when one of its objects is deemed legally deficient, and the defendant need not establish that the jury necessarily relied on that invalid object.

As this Court explained in *Griffin*, quoting from *Yates*, which in turn cited *Stromberg*,

> the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

502 U.S. at 52, *quoting* 354 U.S. at 311-12, *in turn citing* 283 U.S. at 367-68 (other citations omitted).

Thus, the mere existence of valid grounds, and the possibility that the jury could have relied on them, is insufficient to sustain a conspiracy conviction. Here, one of

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[4] Certainly, *Jackson* was not intended to authorize wholesale evasion of *Griffin*; it merely did not, unlike this case, involve arguments and facts that implicated *Griffin*. Indeed, the Seventh Circuit has recently demonstrated that it understands the meaning and applicability of *Griffin* in appropriate cases. *See United States v. Briscoe*, 65 F.3d 576, 584-85 n. 9 (7th Cir. 1995).

the conspiracy's objectives -- the "structuring"-- was legally insupportable, and it is "impossible to tell" whether the jury relied on that invalid ground.

Therefore, it is respectfully submitted that this Court should grant certiorari in order to prevent this circumvention of the important principle enunciated in *Griffin* and the line of cases upon which it relies.

II

THE COURT SHOULD DECIDE WHETHER PETITIONERS' CONDUCT REQUIRED THE FILING OF CURRENCY TRANSACTION REPORTS PURSUANT TO 31 U.S.C. §5313(a)

Petitioners were also charged with multiple substantive violations of 31 U.S.C. §5313(a), namely, the failure to file a Currency Transaction Report ("CTR") for transactions "in connection with the exchange of United States Currency in excess of" $10,000. Seth Wapnick was convicted of 24 of the CTR counts, and Jon Wapnick was convicted of 71 CTR counts.

However, because the conduct alleged did not constitute an offense under §5313(a), it is respectfully submitted that this Court should grant certiorari to determine the important question of the breadth of §5313(a) and its attendant regulations.

As the evidence at trial established, the transactions that were the subject of the CTR counts proceeded in four steps: (1) a third-party businessman provided petitioners' father, Harold Wapnick, or his surrogate a check made out to (or, in limited instances, from) that third-party's business

entity; (2) that check was deposited in one of the 13 corporate bank accounts maintained by Harold Wapnick at Republic National Bank; (3) subsequently, checks were drawn on those 13 accounts, and cashed at Republic Bank;[5] and (4) the cash, in amounts in excess of $10,000, was delivered to the third-party businessman.

The government conceded that the first three steps did not require defendants to file a CTR,[6] but argued that petitioners were obligated to file a CTR for the fourth step: the delivery of the currency to the third-party businessmen. However, as detailed below, there is not any basis in the statute or the regulations for that proposition; indeed, the facts of this case appear to be unlike any other prosecuted under §5313(a).

It is axiomatic under §5313(a) and the accompanying regulations [found at 31 C.F.R. §103.11 *et seq.*] that "only financial institutions are required to file CTRs for transactions involving more than $10,000." *United States v. Tota*, 672 F. Supp. 716, 719 (S.D.N.Y. 1987), *citing California Bankers Ass'n v. Shultz*, 416 U.S. 21, 58, 94 S. Ct. 1494, 1516 (1974).

Here, the government relied on the definition of a "financial institution" in 31 C.F.R. §103.11(i)(3): "[a]

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[5] It was this step that formed the basis for the "structuring" charges, the convictions for which, as discussed *ante*, in POINT I, were vacated as a result of this Court's intervening decision in *Ratzlaf v. United States*, ___ U.S. ___, 114 S. Ct. 655 (1994).

[6] In fact, Republic Bank filed CTR's when the checks from the 13 accounts were cashed.

currency dealer or exchanger, including a person engaged in the business of a check casher." A "currency dealer or exchanger" is further defined in §103.11(f) as "[a] person who engages as a business in dealing in or exchanging currency, except for banks which offer such services as an adjunct to their regular business." A "check casher" is not further defined in the regulations.

Petitioners here were not acting in either capacity.[7] Certainly petitioners did not "cash checks"; rather, indisputably, the bank performed that function when it cashed the checks drawn on the 13 corporate accounts. Indeed, the bank, pursuant to its statutory duty, filed CTR's for these transactions. Thus, the only "check cashing" activity was performed by the bank, and was accompanied by the filing of CTR's.[8]

Just as surely, petitioners were not "dealing in currency" merely by passing in excess of $10,000 to the third parties. Otherwise, the simple payment of more than $10,000 would require the filing of a CTR by the payor, when, in fact, the applicable regulations require only that the *payee* file a Form 8300 [pursuant to 26 U.S.C. §6050(I)]. Likewise,

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[7] Below, the government essentially argued that Seth and Jon were not "financial institutions", but that they aided and abetted *Harold* Wapnick -- who they allege was a "financial institution" -- in evading the CTR requirements. For purposes of argument, this point will not distinguish among the defendants with respect to their status.

[8] Bank customers are not obligated to file CTR's for their transactions with banks. *See United States v. Scanio*, 900 F.2d 485, 488 (2d Cir. 1990).

there is not any provision in the regulations that requires persons (like petitioners) who cash checks in excess of $10,000 at a bank to file a CTR simply because that cash is subsequently delivered to another person. If the definition of "dealing in currency" is that broad, then it is without *any* limits, and defies any definition at all.

The cash that the third-party businessmen received from the petitioners represented money that had been paid by check to the business entities those third-party businessmen represented, and/or which was ultimately received and spent by those entities. As a result, the third-party businessmen were required, under 26 U.S.C. §6050(I), to file a Form 8300, which obliges the *recipient* of more than $10,000 in cash "received in a trade or business" to report that transaction. There is not any requirement that the *payors* such as petitioners in such a transaction file a Form 8300, or any other reporting form.

In fact, the instructions for the Form 8300 include within the definition of "Transaction" "the receipt and conversion of cash to a negotiable instrument (*e.g., a receipt of cash from a person in exchange for a check*)." (Emphasis added). That is precisely the type of transaction the government alleges occurred here.

Thus, since the third-party businessmen received from petitioners more than $10,000 in their "trade or business", the appropriate reporting instrument was a Form 8300, and petitioners were not required to file a CTR for the transaction. *Cf. United States v. Gollott*, 939 F.2d 255, 258 (5th Cir. 1991) [31 C.F.R. §103.11(a)(1) does not "necessarily require[] every participant in a covered

transaction to file a CTR"].[9]

In addition, this case is not like others in which Courts have endorsed an expansive definition of "financial institution". Ordinarily, in a §5313(a) prosecution, a defendant's purpose is to turn *cash* into *checks*, not *vice versa*, as petitioners did here. *See, e.g., United States v. Tannenbaum*, 934 F.2d 8 (2d Cir. 1991). In *Tannenbaum*, as in other cases, the exchange of cash for checks was direct, and was accomplished without any bank involvement, or any CTR's being filed; nor was the cash generated at a bank. The purpose, indeed, was to transform the cash into checks independent of *any* banking transaction. 934 F.2d at 10. *See also United States v. Hernando Ospina*, 798 F.2d 1570, 1572-73, 1578-79 (11th Cir. 1986) (person who used cash to purchase cashier's checks in manner designed to evade CTR requirements was a "financial institution"); *United States v. Goldberg*, 756 F.2d 949, 951 (2d Cir.), *cert. denied*, 472 U.S. 1009 (1985) (defendants sought to convert cash directly into checks, and did so outside the auspices of any bank, and without any CTR's being filed); *United States v. Nersesian*, 824 F.2d 1294, 1313 (2d Cir.), *cert. denied*, 484 U.S. 958 (1987) (object of the charged scheme was to transform cash directly into money orders without triggering the filing of a CTR).[10]

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[9] Petitioner Seth Wapnick's trial counsel raised this issue periodically at trial, and attempted to cross-examine expert witnesses on the issue.

[10] While in *United States v. Hawley*, 855 F.2d 595 (8th Cir. 1988), *cert. denied*, 489 U.S. 1020 (1989), the defendants received checks and returned cash, the rationale under which the defendants in *Hawley* were categorized as a

The interpretation of "financial institution" in those cases makes sense, since applying §5313(a) and the accompanying regulations to instances in which cash is transformed into checks or other monetary instruments is consistent with the purpose of the statute: to prevent the unmonitored conversion of large cash proceeds of illegal activity into other financial instruments. *See*, e.g., *United States v. Goldberg*, *supra*, 756 F.2d at 954.[11]

Here, in contrast, the checks received by petitioners were *not* the proceeds of a crime (indeed, the majority of the third-party businessmen's checks had invoice numbers reflecting legitimate work performed by the payees, while others were expended on legitimate business deductions); nor was the cash the third-party businessmen received. Indeed, the cash was generated not by illegal activity, but by the bank.

"financial institution", and under which they were convicted, was that they constituted a "private bank" under 31 C.F.R. §§103.11(i)(1) & 103.11(b)(2). 855 F.2d at 600-01. Here, below, the government also sought to characterize petitioners as a "private bank", but the District Court rejected that construction.

[11] Even the one case that involved more than a one-step transaction, *United States v. Torres Lebron*, 704 F. Supp. 332, 333 (D.P.R. 1989), still involved the effort to convert cash to a negotiable instrument without any bank involvement, and without any CTR's being filed in the process. In *Torres Lebron*, the defendants brought more than $1 million in cash to a bank, where, with the collusion of bank employees and without any CTR's being filed, it was first converted into prize-winning Puerto Rico lottery tickets, which then were used to purchase Certificates of Deposit.

Of course, petitioners' only transaction at the bank -- turning checks into cash -- was accompanied by the bank's filing a CTR. Indeed, in this case, the government conceded that it could not connect a single third-party businessman's check with a specific check cashed at the bank, as it admitted to the District Court that it was "not attempting to make the direct link and say this specific lump of cash went to this specific check-cashing operation." Tr. 328 (5/13/93); 7609 (5/27/93).

Thus, the event that the government insists required the filing of a CTR -- the simple transfer of currency from petitioners to the third-party businessmen, after the bank had already filed a CTR attendant to the generation of the cash -- constituted neither "check cashing" or "dealing in currency" under the regulations. Consequently, the conduct engaged in by petitioners did not require the filing of a CTR, and did not violate §5313(a).

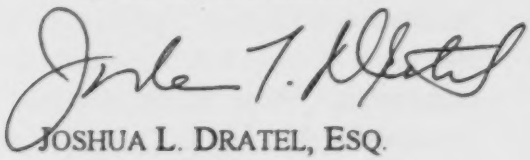
Accordingly, it is respectfully submitted that this Court should grant certiorari to circumscribe the ambit of the statute and regulations accordingly.

CONCLUSION

Therefore, for all the reasons set forth above, it is respectfully submitted that this Court should grant a writ of certiorari to (a) vindicate the important rule set forth in *Griffin*; and (b) determine the scope of 31 U.S.C. §5313(a) as it relates to petitioners' conduct.

Dated: 1 January 1996
New York, New York

Respectfully submitted,



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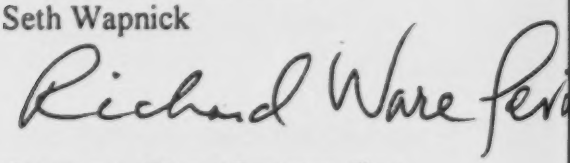

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